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IN THE

Supreme Court Of The United States

October Term, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

vs.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

and

UNITED STATES OF AMERICA

Intervenor-Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the pre-*Employment Division v. Smith* (*Smith*) free exercise decisions of this Court correctly used the compelling interest test to more clearly reflect the historical origins and intent of the Free Exercise Clause, thus supporting the Religious Freedom Restoration Act's (RFRA's) constitutionality and a reconsideration of *Smith*, and answering the question of whether Congress exceeded its authority under Section 5 of the Fourteenth Amendment of the United States Constitution in the negative.

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BRIEF OF *AMICUS CURIAE*[1]

I. INTRODUCTORY STATEMENT

A key issue which the Petitioner has asked this Court to consider is whether the Religious Freedom Restoration Act (RFRA) provides religious people with more protection than the United States Constitution requires. In order to answer this question, the Court must reconsider its decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), in light of the history of the Free Exercise Clause and pre-*Smith* precedent.

The Rutherford Institute is a non-profit organization providing legal services in defense of civil and religious liberties. The Institute believes this issue is critical to the fundamental right of the free exercise of religion for all Americans. As *amicus curiae* in this matter, The Rutherford Institute thus urges the Court to take this opportunity to reject its holding in *Smith* that neutral laws of general applicability cannot offend the Free Exercise Clause. In doing so, the Court would restore the compelling interest test for deciding free exercise cases and uphold the constitutionality of the Religious Freedom Restoration Act (RFRA) on the basis of its proper enactment by Congress under Section 5 of the Fourteenth Amendment.

Justice Souter noted in *Church of the Lukumi Babalu Aye v. City of Hialeah*, the Court's last free exercise decision, that the *Smith* test should be reexamined "in the next case that would turn on its application." 508 U.S. 520, 564 (1993) (Souter, J., concurring in part and concurring in the judgment). Justice Souter entreated the Court to reexamine *Smith* because the decision was "decidedly untypical" of the Court's

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[1] Counsel of record for all parties have consented to the filing of this brief and, pursuant to Rule 37, letters of consent have been filed with the Clerk.

treatment of formally neutral, generally applicable laws in prior free exercise cases but did not overrule those cases. *Id.* The result was "a free-exercise jurisprudence in tension with itself." *Id.*

Since the *Smith* decision, legal scholars have made important inquiries into the roots of free exercise of religion in this country. Professor Michael W. McConnell's *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990) is perhaps the most notable work. Such works were not available to the Court at the time it decided *Smith*,[2] and if they had been, the Court may have found the historical justification for its free exercise precedents persuasive and upheld the compelling state interest test. *See Lukumi*, 508 U.S. at 574-5 (Souter, J., concurring in part and concurring in the judgment). Although this brief will summarize analyses and the many complex arguments in favor of overturning *Smith* found in that scholarship on free exercise history, the Court is commended to the original works cited for the in depth arguments which cannot be recreated in the space permitted here. *Amicus curiae* encourages the Court to re-examine *Smith* now in light of this scholarship and overturn its holding.

The history and original intent of the Free Exercise Clause establish its purpose to protect religious individuals, including the use of exemptions. The compelling interest test analysis effectuates this purpose. This Court's pre-*Smith* opinions thus provide the correct standard for analyzing free exercise cases. As a result, RFRA does not attempt to give more religious protection than the Constitution already provides. Thus, the question of whether Congress exceeded its Section 5 power should be answered in the negative.

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[2] See Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that was Never Filed*, 8 J.L. & Relig. 99, 102 (1990).

II. RECONSIDERATION OF *SMITH* IS SQUARELY WITHIN THE SCOPE OF THIS CASE BECAUSE THE ISSUE OF *SMITH*'S CONTINUED VALIDITY IS ENCOMPASSED BY PETITIONER'S CERTIFIED QUESTION

The second Question Presented in Petitioner's Brief on the Merits calls for a reconsideration of *Smith*:

> 2. Whether Congress violated the constitutional balance between its power under Section 5 of the Fourteenth Amendment and fundamental principles of federalism by commandeering state and local governments to be agents of a federal policy to accommodate religious exercise more than the Constitution requires.

Brief of Petitioner's, page i.

An essential element of Petitioner's Question is thus, first, whether RFRA provides religious protection "more than the Constitution requires." If this Court's pre-*Smith* decisions provide the correct legal standard for free exercise cases, RFRA is simply a codification of that standard dictated by the Constitution. Only if *Smith* is the proper legal standard does RFRA codify an accommodation of religious practices *greater than* this Court has held the Constitution to require.

Smith did not overturn pre-*Smith* precedents. *Lukumi*, 508 U.S. at 573-4 (Souter, J., concurring in part and concurring in the judgment). Instead, *Smith* re-characterized the holdings of those cases in an effort to harmonize them with its reasoning and rationalize its new standard. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1120-24 (1990); Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that was Never Filed*, 8 J.L. & Relig. 99, 104-06 (1990). Since the *Smith* rule remains fundamentally at odds with those precedents, a genuine issue exists as to which constitutional rule courts should follow. *Lukumi*, 508 U.S. at 574

(Souter, J., concurring in part and concurring in the judgment). The Court must resolve this issue in order to answer Petitioner's second certified question.

There are other important reasons to reconsider *Smith*. First, the *Smith* rule was established without briefing and oral argument. *Id.* at 571-2. Rarely, if ever, has the Court decided an issue of such magnitude, not presented by the parties or the facts of the case, without notice and argument. *See generally* Laycock, 8 J.L. & Reg. 99. Second, and related to the first reason, *Smith* set forth a broader constitutional rule than was necessary to resolve the case. *Id.* at 572-3. Indeed, Justice O'Connor reached the same result as the majority by applying the existing free exercise precedents. *Id.* Finally, in the course of making its sweeping rule, *Smith* did not inquire into the roots of the free exercise of religion to interpret the original meaning of the Free Exercise Clause. *Id.* at 574-6. Before *Smith*, little information existed on the history of the Free Exercise Clause in either earlier Supreme Court opinions or in scholarly articles. Legal scholarship developed after *Smith* confirms that the pre-*Smith* compelling interest test is consistent with the original understanding that free exercise of religion was to be protected from the burdensome effects of neutral laws of general applicability. That scholarship, some of which is summarized below, must be considered now if *Smith*'s vitality as precedent is to be secure enough to justify considering rejection of RFRA.

In short, the Court must not only reconsider *Smith* as a necessary step to determining RFRA's constitutionality, but also to ensure that free exercise jurisprudence is not left in an unsettled and, to a broad spectrum of society, unsettling condition.

III. THE USE OF THE COMPELLING INTEREST TEST FOR DECIDING FREE EXERCISE CLAUSE CLAIMS, AS CODIFIED BY RFRA, IS CONSISTENT WITH THE HISTORICAL UNDERSTANDING OF THE FREE EXERCISE OF RELIGION

The Court must examine the historical roots of the free exercise of religion in this country in order to understand the original meaning of the Free Exercise Clause. In Religion Clause adjudication, no less than any other area of law, Justice Holmes' statement is most fitting: "A page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). The determination of "the ultimate constitutional objective" as expressed by the Framers and "*as illuminated by history*" is of particular relevance here. *Lynch v. Donnelly*, 465, U.S. 668, 678 (1984); *Walz v. Tax Commission*, 397 U.S. 664, 671 (1970). This historical inquiry shows that the long-standing method of exempting religious practices from generally applicable laws as an acceptable means of protecting religious beliefs is more consistent with the Framers' intent than a position of facial neutrality.

Using this approach, after a religious person demonstrates that a law burdens the free exercise of his or her religious beliefs, the government must show that the law serves some compelling state interest and is the least restrictive means for achieving that goal. If the state cannot meet its burden, courts must grant a religious exemption. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 403 (1963). This exemption view of the Free Exercise Clause thus protects against unintended burdens on the free exercise of religion unless the state can demonstrate compelling need.

Ultimately, the issue of the nature and role of religion reduces to a question of perspective.[3] The compelling interest

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[3] From the perspective of the State, allowing exemptions is a slippery slope which would result in anarchy. From the religious believer's perspective such fears are baseless because in reality there are few proper

test forces a court to look at the case from both perspectives. First, the court must consider the religious adherent's perspective, and then it must analyze the case from the State's perspective.

Smith, however, advances a competing view. The individual religious adherent's perspective and concerns are irrelevant. According to *Smith*, the Constitution does not require exemptions for generally applicable laws. The protection provided by the Free Exercise Clause, then, is only against blatant attacks on specific religious practices. McConnell, 103 Harv. L. Rev. at 1418. Using this approach, the court asks the question from the State's perspective, is this law specifically directed at religious practices? If not, no protection through exemptions is merited.

Professor McConnell argues that the appropriate analysis of the Free Exercise Clause involves the perspective of both the state and the religious believer. Using this analysis requires the court to study the impact of the law in question on the religious petitioner, often a minority, even if the law makes no obvious reference to religion or has no religious dimension to the state or majority. The pre-*Smith* exemptions view is consistent with this approach and the development of protection from the time of the colonies to the framing of the Free Exercise Clause.

The Framers of the Free Exercise Clause had a long and varied tradition of religious experimentation to draw on as a result of the diversity in the colonies' and newly independent states' approaches to the relationship between Church and State. Although most of the colonies had established religions, the trend toward religious pluralism as an emerging

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laws which would conceivably conflict with the free exercise of religion. The religious perspective supports its position by claiming that proper laws would not conflict and conduct which was disruptive of the peace should be punished.

policy was tangibly rewarded. In those colonies without an established religion, most notably Pennsylvania, religious pluralism flourished and was rewarded with the highest levels of immigration. *Id.* at 1430. The experience of governments which supported a particular religion, on the other hand, show that religious diversity was not a virtue and persecution of religious minorities occurred. In fact, the term "free exercise" was first used in an American legal document when Lord Baltimore required the governor of Maryland to abstain from persecuting Christians in general and Roman Catholics in particular. W. Russell, *The Land of Sanctuary (dd ed. 1908)* at p. 130.

The trend towards greater protection of religion continued throughout other state legal documents. The Rhode Island Charter, for instance, used the term "liberty of conscience" to protect the free exercise of religion. The only restriction on this freedom was that it could not conflict with laws established to keep the peace. McConnell, 103 Harv. L. Rev. at 1426. Similar protection was later enacted in other colonies and were the most common expressions of the freedom in the constitutions of the newly formed states. The free exercise provisions expressly overrode any law contrary to religious exercise; and they limited the free exercise of religion only as necessary for the preservation of the peace as opposed to being subject to the entire body of the law. *Id.* at 1427. It is this tradition of tolerance within limits which is the precursor of the exemption view of the Free Exercise Clause.

The most direct influence on the development of religious tolerance in the constitutions of several of the newly formed states and the federal constitution was the effect of the writings of John Locke and their impact on Thomas Jefferson's Bill for Establishing Religious Freedom. *Id.* at 1430-31. Locke determined that religious intolerance was an indication of poor government and would result in civil disruption because religious diversity could not effectively be contained, and seeking to prevent it would only cause the disruption

which the government sought to avoid. If a free exercise conflict developed, however, Locke believed that the State's view was supreme and the individual could either comply with the law or disobey it according to the dictates of religion and accept the punishment of the State. *Id.* at 1433-34. Locke's view is consistent with the no-exemption policy of *Smith*. The development of religious freedom, however, did not stop with Locke.

Immediately after the American Revolution, the prevailing view was that State sponsorship of religion was inimical to the vitality of religion and would improperly subject it to State control. *Id.* at 1438-39. The role of the State under this view was that it should provide protection and non-interference with the practice of religion. In return, religious groups would inculcate their members with religious faith and, as a by-product, with virtue or public morality. This view prevailed over the old model under which the State supported religion to derive the benefit of public morality. *Id.* at 1441-43. In light of this new view, Locke's view of religious tolerance was deemed insufficiently protective of the free exercise of religion.

Additionally, the advent of judicial review and its protection of individual rights as a check on the power of the State led to further expansion of the doctrine of free exercise of religion. As a result of the constitutional grant of the responsibility to the courts to enforce the boundary between the power of the State and the rights of the individual, the court was empowered and obligated to determine what religious freedom requires and to protect it through the use of exemptions. *Id.* at 1445.

Thomas Jefferson's view of the role of religion, although similar to Locke's, represents an expansion of freedom of religion. Jefferson believed the role of the State was to act to prevent injury to others, or in other words, secure the peace. Toward this end, he believed that religious opinion or belief was not properly the subject of governmental action. This

belief extended to his rejection of State funded or sponsored religion. On the other hand, he believed that actions or conduct were the province of the State, and therefore, violations of the law should be prosecuted. *Id.* at 1451. Further expanding the view of religious free exercise, James Madison advocated a system in which the demands of religion would take precedence over the secular law in those matters concerning religion. *Id.* at 1453.

Most state constitutions comported with Madison's views on giving precedence to the individual's religious duties over the power of the State, and specifically included protection for the free exercise of religious beliefs. These free exercise provisions were stated affirmatively unlike the Jeffersonian view which, like that of Locke, merely tolerated religion. Professor McConnell relies on the religious freedom protections found in the various state constitutions as support for his interpretation of the federal constitution on the grounds that they are:

> the most direct evidence of the original understanding, for it is reasonable to infer that those who drafted and adopted the first amendment assumed the term "free exercise of religion" meant what it had meant in their states. The wording of the state provisions thus casts light on the meaning of the first amendment.
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> *Id.* at 1456.

Although all of these provisions protected the free exercise of religion, there were differences in the scope of the protection. The more expansive statement applied to all actions with a religious motive, with the limitation of preserving the peace and safety of the remainder of the community. The other constitutions protected religious conduct only in the context of "worship." The term "worship" was used to limit the freedom to the rituals of religion. Professor McConnell concludes that the fact that the federal constitution used the

more expansive expression of the freedom was deliberate in light of the numerous examples of a narrower expression of the freedom. *Id.* at 1460. As a further indication of the direction of thought on the issue, he points out that subsequent state constitutions followed the more expansive definition. *Id.* at 1461.

Under these state constitutions, then, free exercise was generally limited only to prevent disturbances of the peace and safety of the remainder of the community. *Id.* at 1462. The presumption, therefore, was that the right of free exercise prevails in every instance except where the religious act violates a peace and safety regulation or when the religious act would trespass on the private rights of another. Thus, this approach valued freedom of religion and the perspective of the individual above a state's interest in areas not affecting the peace or public safety.

An examination of controversies prior to the passage of the United States' Free Exercise Clause supports the conclusion that the right of free exercise was intended to be an affirmative statement which permitted exemptions from generally applicable laws for religious acts, subject to the limitation that the religious acts not violate laws preserving peace, safety and the private rights of others. *Id.* at 1466. *But see*, Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992). The issue of exemption arose only rarely in the largely homogeneous Protestant colonies. When it did arise, it usually involved oath requirements, military conscription or religious assessments. *Id.* Most often, an exception was created to the requirement to accommodate the religious conviction. *Id.* at 1467.

Another controversy supporting the exemption view arose because the federal Constitution did not contain general protections for religion. One argument stated that as the federal government is one of enumerated powers only, the absence of any power to create laws affecting religion provides

protection for religion. This argument was rejected by supporters of a free exercise amendment on the grounds that the many enumerated powers were more than sufficient to burden the exercise of religion.

The second argument asserted that the newly created system of checks and balances in conjunction with the existing religious pluralism would assure that no single group could gain sufficient power to enable it to oppress or frustrate the religious preferences of any other group. This argument was rejected on the grounds that, although it was adequate as far as it went, it did not provide sufficient protection against unwitting oppression of minority groups. The proponents of a free exercise amendment worried that minority groups with sufficient influence at the state level would not have equivalent influence at the national level and could be subjected to laws of general application which would tend to oppress religion. *Id.* at 1479-80. Therefore, the passage of the Free Exercise Clause itself lends further support to the idea that the Founders intended to provide exemptions as a means of protecting minority religions from laws of general application.

After debate, the final version of the amendment protected the free exercise of religion. Professor McConnell provides a detailed explanation of the development of the final version and possible reasons for differentiation in word choice. He concludes that the decision to use the word "religion" alone, instead of, or in conjunction with, the phrase "rights of conscience" was to provide a broad protection to organized religion. *Id.* at 1488-94.

The use of the word "religion" instead of "rights of conscience" is significant because it recognized that when religious convictions differed from the secular law, the individual was torn between two sovereigns, the State and God. This type of conflict was seen as materially different from a situation where an individual's moral judgment conflicted with a law. This was a difference in kind which was deemed worthy of special protection. Providing specific protection for relig-

ious differences was entirely consistent with the world view of the drafters. The Drafters believed that religious beliefs merited special protection, not because those beliefs were qualitatively superior to non-religious judgments, but because of the conflict between dual sovereigns, both of whom demanded obedience that was beyond the individual's control to harmonize. *Id.* at 1496-97.

It follows, then, that the *Sherbert* rule and its progeny allowing exemptions are more consistent with the understanding of the drafters of the First Amendment. *See Lukumi*, 508 U.S. 574-6 (Souter, J., concurring in part and concurring in the judgment). The history and original intent of the Free Exercise Clause support protection of religious individuals through providing exemptions, not merely prohibiting anti-religious discrimination. *Id.* at 1512. The compelling interest test is tailored to protect individual rights and to allow for exemptions when government has not used the least restrictive means in achieving its interest. The history and practice of allowing exemptions, the intent of the Founders, the state constitutions and the pre-Free Exercise Clause controversies all support the practice of allowing exemptions from generally applicable laws. *Id.* at 1511. RFRA's use of the compelling interest test, therefore, merely encapsulates the purpose of the Free Exercise Clause and does not add to the Constitution. As such, the question of whether Congress exceeded its Section 5 power should be answered in the negative.

IV. THE PRE-*SMITH* DECISIONS OF THIS COURT IN FREE EXERCISE CASES EMBODY THE HISTORICAL UNDERSTANDING THAT RELIGIOUS PRACTICES ARE PROTECTED FROM THE BURDENSOME EFFECTS OF NEUTRAL LAWS OF GENERAL APPLICABILITY

Prior to *Smith*, the Court's decisions in free exercise cases consistently embodied the concept that the Free Exercise Clause required not only formal neutrality, which would

prohibit only those laws whose object is to discriminate against religion, but also substantive neutrality, which would additionally require exempting religious practices from formally neutral laws. *Lukumi*, 508 U.S. at 562-6 (Souter, J., concurring in part and concurring in the judgment). The articulated rule applied in each of those cases was that a compelling government interest must be demonstrated to justify any substantial burden placed by the government on religious practice. There is no doubt that the Court applied heightened scrutiny in those cases. *See, e.g., Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 384-85 (1990); *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829, 829 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987); *Bob Jones University v. United States* 461 U.S. 574, 604 (1983); *United States v. Lee*, 455 U.S. 252, 257-58 (1982); *Thomas v. Review Board*, 450 U.S. 707, 718 (1981); *Yoder v. Wisconsin*, 406 U.S. 205, 215-29 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963); *Cantwell v. Connecticut*, 310 U.S. 296, 304-07 (1940). *See also Lukumi*, 508 U.S. at 565-6 (Souter, J., concurring in part and concurring in the judgment).

In none of those cases did the Court inquire into the original meaning of the Free Exercise Clause in developing and applying the compelling interest test (nor did it in *Smith*), *Lukumi*, 508 U.S. at 574-5 (Souter, J., concurring in part and concurring in the judgment). Yet, that test emerged from the Court's natural reading of the Free Exercise Clause as a restriction on government's power to burden religious practices, whether by a law's object or by its unintended effect.

Such a reading is consistent with the Court's treatment of other First Amendment rights, frequently affording them exceptions from neutral, generally applicable laws. Laycock, 8 J.L. & Relig. at 103-04 (citing *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982); *NAACP v. Alabama*, 357 U.S. 445 (1958)(political parties and move-

ments exempted from facially neutral disclosure laws); *Hustler v. Falwell*, 458 U.S. 46 (1988)(creating special defenses for media against facially neutral tort law).

It is apparent from a review of Section III above that the historical origins of the Free Exercise Clause provide considerable support for the compelling interest test which the Court derived from a plain reading of the text. It certainly undermines the remark in *Smith* that the compelling interest test "contradicts both constitutional tradition and common sense." *Smith*, 494 U.S. at 885. Rather, it reveals how fully pre-*Smith* cases embodied the understanding of the Framers of the Free Exercise Clause, and how far *Smith*'s rule diverges from it.

Smith is inconsistent with free exercise precedent, which dates from *Sherbert*. Instead of adhering to this precedent, the Court relied primarily on cases which have been overruled or were minority positions. For instance, the Court relied on and quoted extensively from *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), without mentioning that this case was essentially overruled in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). *Smith*, 494 U.S. at 879. The Court also quoted from the three-justice plurality opinion in *Bowen v. Roy*, 476 U.S. 693 (1986), even though that opinion was not followed by five other Justices in separate opinions. *Smith*, 494 U.S. at 883. *Bowen* was later expressly rejected in *Hobbie*, 480 U.S. 141 (1987). The Court also cited an older case, *Reynolds v. United States*, 98 U.S. 145 (1879), which upheld a law prohibiting polygamy, practiced then by Mormons, but did so on the reasoning that the Free Exercise Clause protects only beliefs, not conduct. *Id.* at 166-67. But the Court later retreated from that position in *Cantwell*, 310 U.S. at 303-04. Even so, the Court has read *Reynolds*'s elaboration of the evils of polygamy as standing for the compelling interest test. *See, e.g., Sherbert*, 374 U.S. at 403.

In sum, these cases and their subsequent treatment by the Court validate the Court's continued endorsement of the compelling interest test, rather than support *Smith*'s rejection of it.

Lukumi, 508 U.S. at 569-70 (Souter, J., concurring in part and concurring in the judgment).

Smith's treatment of *Cantwell* and *Yoder*, two cases which unquestionably required exemption of religious practices from neutral laws of general applicability, is also problematic. Rather than apply those cases as pure free exercise precedents, *Smith* instead re-characterizes them as "hybrids," involving "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents . . . to direct the education of their children." *Smith*, 494 U.S. at 881-82. This hybrid distinction, however, is not supported by the text, nor the history of the Free Exercise Clause. Even so, religious freedom was the fundamental issue in both cases, as each was explicit in stating. *Cantwell*, 310 U.S. at 303-07; *Yoder*, 406 U.S. at 201. *Smith*'s attempt, then, at distinguishing *Cantwell* and *Yoder* as "hybrid" cases has instead shown them to be sound free exercise precedent.

Finally, *Smith* tries to reconcile its conclusion with the unemployment compensation cases involving free exercise. *Frazee*, 489 U.S. 829 (1989); *Hobbie*, 480 U.S. 136 (1987); *Thomas*, 450 U.S. 707 (1981); and *Sherbert v. Verner*, 374 U.S. 398 (1963). The Court noted that these were the only free exercise cases in which the compelling interest test had been used to invalidate a government action, and had only done so because they involved "a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct," *Smith*, 494 U.S. at 883-4, and as such "stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.*

But as Professor McConnell has observed:

> Difficulty of administration can fairly constitute at least part of the government interest in enforcing the

> law without exceptions but it is hard to see why this concern should limit the universe of potential claims. Moreover, if this is the distinction, it is hard to see why the compelling interest test does not apply to many contexts other than just unemployment compensation - indeed to the full universe of claims governed by the due process requirement of "some kind of hearing."
>
> McConnell, 57 U. Chi. L. Rev. at 1123.

Moreover, *Smith*'s distinction of these cases is one without a difference, because most free exercise cases "resemble the unemployment compensation cases in that they involve individualized governmental assessments of the claimant's circumstances." *Id.* (citing *United States v. Lee*, 455 U.S. 252 (1982); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) as examples of non-unemployment compensation cases that involved such individualized governmental assessments without the application of the compelling interest test).

Smith, therefore, is unconvincing in its effort to achieve its result without overturning any precedent, by relying on cases of dubious application (*Gobitis, Bowen* and *Reynolds*), and by distinguishing established free exercise precedent as either not primarily about free exercise (*Cantwell* and *Yoder*) or as *sui generis* (the unemployment compensation cases).

In fact, these free exercise cases all demonstrate that the compelling interest test was a natural outgrowth of the Court's plain reading of the Free Exercise Clause as requiring exemption from neutral, generally applicable laws - a reading which now acquires added texture from the recent legal scholarship on the historical context of the Free Exercise Clause.

CONCLUSION

The Court should uphold RFRA's constitutionality by reconsidering and rejecting its holding in *Smith* in light of post-*Smith* legal scholarship, which casts serious doubt on *Smith*'s consistency with the original understanding of the Free Exercise Clause and which substantiates the consistency of the compelling interest test with that same understanding.

Respectfully submitted,

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